

**TESTIMONY BEFORE THE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
H.R. 964, "SECURELY PROTECT YOURSELF AGAINST CYBER TRESPASS ACT"
ENERGY AND COMMERCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
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BY
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ON BEHALF OF THE INTERACTIVE ADVERTISING BUREAU**

Chairman Rush, Ranking Member Stearns, and members of the Subcommittee – thank you very much for inviting me to testify on H.R. 964, the “Securely Protect Yourself Against Cyber Trespass Act.” My name is Dave Morgan and I am here today wearing two hats. First, I am the founder and chairman of TACODA, Inc., a six-year-old New York-based online advertising company that has been a pioneer both in targeted online advertising as well as consumer privacy protection. I am also here today as Chairman of the Public Policy Council of the Interactive Advertising Bureau (“IAB”). Founded in 1996, the IAB represents more than 300 leading interactive online companies that are actively engaged in, and support the sale of, interactive and online advertising. Some members include Yahoo, AOL, MSN, Google, Forbes.com, New York Times Digital, and CNET Networks. IAB membership is responsible for selling more than 86% of interactive and online advertising in the United States. On behalf of its members, the IAB evaluates and recommends standards and practices, fields interactive effectiveness research, and educates the advertising industry. IAB opened a Washington, D.C. office this year to oversee regulatory matters, legislative affairs, and public policy initiatives that affect the interactive and online advertising industry.

Consideration of this legislation in past Congresses has been an extraordinarily open and bi-partisan effort. We have welcomed the opportunity to participate with the Committee and staff in developing appropriate language that balances consumer protection with fostering continued growth of the Internet. I look forward to sharing both my company’s and the IAB’s members’ experiences and insights with the Subcommittee. It is abundantly clear to me that the Subcommittee intends this legislation to combat purveyors of malicious software. At the same time, it is clear that this legislation is not intended to affect legitimate online practices such as those employed at TACODA.

At the outset, I want to highlight that since this legislation was first introduced in the 108th Congress, the consumer experience as it relates to spyware and online advertising has improved. This is due to several significant developments. First, a primary driver for improvement was the Committee's focus on this issue, and its clear indication that bad actors online will not be tolerated. Second, the Federal Trade Commission and state enforcement authorities have, in their law enforcement activities and settlements, given industry fairly clear guidelines on what is and is not acceptable under existing law. Third, and as others on the panel will describe, industry self-regulation has played a significant part in defining the rules of the road for downloadable software. Given these developments, we believe that certain provisions of the legislation, and particularly Section 3, merit a renewed look.

Let me start by telling you a little bit about TACODA. Created in 2001, TACODA is an interactive and online advertising company based in New York City with offices in Dallas, Chicago, Los Angeles, and Seattle – among others. TACODA is the largest and most advanced online ad targeting network in the world. We safely and effectively deliver hundreds of billions of relevant banner ads each month for companies such as Coca-Cola, HP, Sony, Microsoft, and American Express. These ads are delivered as “in-page” or “embedded” ads – not pop-ups – within the pages of more than 4,500 of the most recognized Web sites on the Internet. Some include the sites of The New York Times, NBC Universal, Cars.com, The Dallas Morning News, and the Associated Press. This synergy produces a better experience for consumers, more effective and more efficient advertising for marketers, more revenue, higher yields, and improved consumer loyalty.

The protection of consumer privacy and the fundamental principles of relevancy, transparency, and freedom of choice have been hallmarks of TACODA's business practice. Consumer privacy and data protection are essential to our business success, and TACODA is the unquestioned leader in “safe targeting.” TACODA leverages its “safe targeting” technology on partner Web sites to collect only anonymous, non-identifying information and group visitors into segments that are relevant for advertisers. These visitors then receive advertising most relevant to their interests whenever they visit a Web site with which TACODA has a relationship.

TACODA is a leader in working with industry in developing best practices and self-regulatory guidelines. It is a board member of the Network Advertising Initiative (the “NAI”), and an active member of the Direct Marketing Association (“DMA”) and its Interactive Marketing Advisory Board.

In November of last year, TACODA announced its “Consumer Choice Initiative” to go even farther than regulations or industry best practices requirements for protecting consumer privacy. Specifically, TACODA:

- Collects only anonymous, non-identifying information.
- Notifies every consumer who participates in its network at least once every six months and gives them a chance to opt out of receiving ads from the TACODA network.
- Developed patent-pending technology to recognize a consumer’s opt-out status even in instances where they have deleted their browser cookies. This technology was designed to preserve consumer choice.
- Actively monitors content, to help protect against associating branded advertising with inappropriate content.

Now, I would like to talk about the industry more broadly. Interactive and online advertising is a primary means of funding for cost-free, rich Internet content, as well as free access to unparalleled products and services. Such advertising has lowered barriers to market entry, enabling new businesses, both small and large, to thrive. Internet advertising and commerce has enabled local businesses – from antiques dealers to auto dealers, to reach national markets. Consumer confidence in online channels is critical to the vitality of the interactive and online advertising industry. Thus, we take very seriously all issues that affect the consumer relationship, including legitimate software downloads that are used for advertising practices. Recognizing the importance of industry standards and best practices to ensure continued consumer confidence in the online medium, TACODA and the IAB have worked closely with Web sites to develop guidelines to address topics including e-mail, pop-up ads, and lead generation. Self-regulatory efforts, especially in the context of the Internet and interactive and online advertising, are an extremely effective and efficient means to promote legitimate practices and marginalize bad actors. For example, TACODA is in full compliance with the NAI principles, which have been applauded by the FTC and provide a self-regulatory framework for the practice of interactive and online preference-based marketing.

Many people are probably surprised by the impact that interactive and online advertising has already had in the marketplace in its still very short existence. The vast majority of the content on the Internet today – free news, entertainment, and information – is supported primarily by interactive and online advertising. Consumers do not pay for this. Telecommunication service companies do not pay for this. Online advertising bears a great majority of these costs.

Free content is enriching lives in rural America, urban America, among immigrants, and among the very poor. I grew up in a small town in western Pennsylvania. The only way to get a printed copy of The New York Times is to order it at least two days in advance and to pay \$5 per copy. Needless to say, not many people in my town can afford to read “All the News That’s Fit to Print.” Now, because of the Internet and ad-supported content, everyone in town can read it for free, either through their Internet access or on a computer at the Shaw Public Library. Without having to pay for printing presses and trucks, our industry is supporting diverse voices and views across our land and around the world. These new voices are keeping traditional media honest and in tune with the local communities. These new outlets permit government entities and public officials to speak directly to their constituents, without filters and bias. These new online platforms are supporting the efforts of millions of small businesses and home businesses, giving them access to global markets. For example, eBay helped created hundreds of thousands of new small businesses and home businesses and they are 100% dependent on interactive and online advertising and e-commerce.

Now, let’s talk specifically about H.R. 964. We at TACODA support efforts to combat spyware, the underlying impetus of the bill. We strongly agree that spyware is bad. It is bad for consumers and bad for business. It can infect their machines with malicious software and remove the ability of consumers to exercise choice on their computers. Spyware is equally bad for the interactive and online advertising industry. It makes consumers suspicious when online. This, in turn, makes advertisers more wary to invest their marketing efforts in online channels. I don’t think that anyone on the panel disagrees.

We have worked diligently with the Committee staff since the bill’s first introduction to ensure that the bill does not impinge on certain legitimate practices like those of TACODA. For that reason, it is easy for TACODA to support the bill. That said, there is always a risk that legislation that governs complicated technology could result in limiting and/or stifling innovation, which we know the Committee does not want. However, as someone who has worked in this industry for more than 15 years, since before we even had Web advertising, and as a designated representative of the IAB, I should also inform you that there are provisions in the bill as currently drafted that could have some broad and unintended consequences on the interactive and online advertising industry.

Given the dramatic advances in combating spyware and the guidance now available from enforcement and self-regulatory initiatives that did not exist at the outset of the last Congress, we believe that certain provisions of the bill should be reexamined. I am beginning to believe that certain provisions of the bill would have the effect of stifling innovation among legitimate companies without providing countervailing

consumer benefits in light of such advances. Extreme measures such as prescriptive notice and consent regimes were important two years ago given the pervasiveness of malicious spyware and the lack of clear guidelines for downloadable software. Given the advances described earlier, such regulatory restrictions may no longer be warranted.

Section 3 in particular, could have adverse consequences for legitimate interactive and online advertising. Indeed, as all media advertising increasingly migrates to interactive platforms, we are concerned that this bill may unnecessarily limit businesses interaction with consumers.

We are concerned that the types of software and technologies that would be included under the definition of “information collection program” and the requirements in Section 3 would impact legitimate Internet advertising practices. First, as I have already stated, regulators such as the FTC and state attorneys general, as well as self-regulatory bodies such as TRUSTe, have given clear guidance on the issues addressed in Section 3. Moreover, the bill’s broad definitions of “computer software” and “personally identifiable information,” as well as its requirements in connection with collection of both “personally identifiable information” and “non-personally identifiable information” tied to advertising extend far beyond addressing the abusive practices that were the impetus for this legislation.

In addition, I am concerned that Section 3 could result in little or no advertising on Web sites that are heavily dependent on advertising that would be regulated by the bill. This, in turn, could limit consumers’ rich Internet experiences, innovation, and novel services that are emerging. It could also have the unintended consequence of decreasing the abundance of free content that is currently available to consumers. In addition, it could severely limit a business’s ability to accurately describe what it is offering, instead putting all software downloads in the same basket, with the same prescribed disclosure language. Defining software in legislation has proven elusive, and for good reason. Technology advances at an astonishing rate. No one here wants legislation that will limit the use of the cookies, java, html, and Web beacons of the future.

For these reasons, we recommend that the Subcommittee focus on the specific harmful acts, as it did in Section 2, or focus on software that collects truly sensitive information. By targeting a narrower set of actions, legitimate advertisers could continue to deploy innovative technologies, spurring continued Internet growth.

Additionally, IAB member companies share the Subcommittee's goal of ensuring that anti-spyware providers can continue to remove bad software. While we believe that such companies are already succeeding in doing so, we respectfully recognize the goal that the "Good Samaritan" provision contained in Section 5 attempts to achieve. We would, however, have concerns with changes that broaden this language and create a more extensive immunity provision that would afford companies broad discretion to remove legitimate software, which often is misidentified as spyware. Such removals may cause programs to function improperly or not at all. The bill should not include any provision that could result in the unfettered ability of a software company to remove legitimate software without consequence. Such regulation of an emerging technology would preclude major advances as convergence emerges. Ultimately, it would be the consumer who is disadvantaged by this type of provision.

I would like to address several final points that bear mentioning. First, it seems to me that the damages provision extends beyond the consumer protection legislation passed through this Committee and Congress over the years. Second, we should make certain that the preemption provision serves its intended effect of creating a single standard for consumers and businesses. Third, the provision addressing how civil penalties should be determined should simply refer to the section of the FTC Act that addresses this point directly so as not to create confusion among businesses, the FTC, and the courts. Finally, given the rapid changes in technology, we support the sunset provision in the legislation.

Thank you for considering the views of TACODA and the IAB on these issues. The success of the Internet has helped fuel this country's economy, and it is important to ensure that this medium can continue to grow and thrive. We look forward to continuing to work with you on this legislation.